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Supreme Court, U.S
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No. 04-840

In The Supreme Court of the United States

LYNN ALLAN JENKINS, I.,

Petitioner Pro Se,

v.

MTGLQ INVESTORS, L.P.,
a Delaware limited partnership,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE W. PRATT
JONES WALDO HOLBROOK & McDONOUGH PC
Counsel of Record
170 South Main Street
Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Facsimile: (801) 328-0537

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

MTGLQ Investors, L.P. ("MTGLQ") is a limited partnership, whose general partner is MLQ, L.L.C., which holds a 1% interest in MTGLQ, and whose limited partner is The Goldman Sachs Group, Inc., which holds a 99% interest in MTGLQ. MLQ, L.L.C. is a limited liability company, whose members are Goldman Sachs Global Holdings L.L.C. and The Goldman Sachs Group, Inc. Goldman Sachs Global Holdings L.L.C. is a limited liability company whose members are The Goldman Sachs & Co. L.L.C. and The Goldman Sachs Group, Inc. The Goldman Sachs & Co. L.L.C. is a limited liability company whose member is The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. is a publicly traded entity which, as indicated, owns more than a 10% interest in MTGLQ.

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JURISDICTIONAL STATEMENT

As discussed in Part I of the Argument below, this Court does not have jurisdiction pursuant to 28 U.S.C. § 1254, because this case is not "in" the court of appeals.

STATEMENT OF THE CASE

Petitioner Lynn Allan Jenkins, I. ("Jenkins") commenced this action (the "Action") by filing a *pro se* complaint in the Second Judicial District of Davis County, State of Utah. Jenkins never served the Complaint on respondent MTGLQ Investors, L.P. ("MTGLQ").

Instead, to effectuate service on MTGLQ, Jenkins served the Utah Division of Corporations and Commercial Code (the "Division"), pursuant to *Utah Code Ann.* § 48-2a-907(4). This statute authorizes a plaintiff to serve a foreign limited partnership that has not registered with the Division, but is "transacting business" in Utah, by serving the Division.

In fact, MTGLQ has never been "transacting business" in the state of Utah, as defined in *Utah Code Ann.* § 48-2a-902(2). Accordingly, service of MTGLQ by serving the Division was improper.

Because Jenkins never served MTGLQ, MTGLQ didn't know the Action had been filed, and Jenkins was able to obtain a default judgment, entered on September 4, 2003, for almost $2,000,000.

MTGLQ was completely unaware of the filing of the complaint or the entry of the judgment until November 24, 2003, when MTGLQ's legal counsel received a foreclosure

report which disclosed the judgment as a lien against certain real property.

Eighteen (18) days later MTGLQ timely filed its Notice of Removal of the Action, pursuant to 28 U.S.C. § 1441. A true and correct copy of the Notice of Removal (without exhibits) is attached hereto as Appendix A. As set forth in the Notice of Removal, the district court had original jurisdiction of the Action pursuant to 28 U.S.C. § 1332, in that: (1) plaintiff Jenkins is a resident of Davis County, Utah; (2) defendant MTGLQ was a limited partnership organized under the laws of Delaware, whose principal place of business was in New York; and (3) the matter in controversy exceeded the sum or value of $75,000.

Following removal to the U.S. District Court for the District of Utah, MTGLQ filed a motion to set aside the default judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure, on the grounds that (1) the judgment was obtained by Jenkins' fraud on the court, and (2) since MTGLQ had not been served, the judgment is void.

Following removal Jenkins filed, first, a motion to dismiss or strike the removed Action, and then another similar motion, to dismiss for lack of jurisdiction. In both motions Jenkins contended that the removed Action should be dismissed for lack of jurisdiction.

Following a hearing on March 31, 2004, the district court entered its Order, granting MTGLQ's Rule 60(b) motion, and denying Jenkins' motions challenging the court's jurisdiction. A copy of the district court's Order is attached as Appendix "C" to Jenkins' Petition.

Jenkins' appeal to the Tenth Circuit Court of Appeals was dismissed *sua sponte*, "because the order being appealed is not final or otherwise immediately appealable." A copy of the Tenth Circuit's Order is attached as Appendix "A" to Jenkins' Petition. On September 15, 2004 the Tenth Circuit denied Jenkins' Petition for Rehearing *En Banc*. A copy of this Order is attached as Appendix "B" to Jenkins' Petition.

Jenkins then filed his Petition for a Writ of Certiorari with this Court.

ARGUMENT

I. THE COURT MAY NOT GRANT CERTIORARI BECAUSE THE CASE IS NOT "IN" THE COURT OF APPEALS.

Pursuant to 28 U.S.C. § 1254, only "[c]ases in the courts of appeals may be reviewed by the Supreme Court. . . ." As explained in *Moore's*:

> Whether a case is "in" the court of appeals depends on whether that court has jurisdiction of the case. If the court of appeals does not have jurisdiction of the case, the Supreme Court may not review it under 28 U.S.C. § 1254.
>
> The court of appeals has jurisdiction of a case if the district court has rendered a final, appealable order from which a timely appeal has been taken.

22 *Moore's Federal Practice* § 405.03[1][a], p. 405-7 (3rd ed. 2004).

In this case Jenkins appealed from the district court's Order (1) setting aside the default judgment, and (2) denying Jenkins' motions to dismiss for lack of jurisdiction. Accordingly, the Tenth Circuit dismissed Jenkins' appeal *sua sponte*, "because the order being appealed is not final or otherwise immediately appealable." That left the merits of Jenkins' complaint to be addressed in the district court.

The Tenth Circuit's dismissal of Jenkins' appeal due to the lack of a final order is clearly correct. The denial of a motion to dismiss for lack of jurisdiction is not a final order, and therefore is not appealable. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 659 (2nd Cir. 1995) ("[A] denial of a motion to dismiss is ordinarily considered nonfinal, and therefore not immediately appealable."). Even if Jenkins' motions for dismissal were treated liberally as motions for remand, orders denying remand are also not final, for purposes of appeal. *See, e.g., Huffman v. Saul Holdings Ltd. P'ship,* 194 F.3d 1072, 1076 (10th Cir. 1999).

Likewise, the portion of the district court's Order granting MTGLQ's Rule 60(b) motion is not appealable:

> [I]f the district court grants a motion under Rule 60 and orders a new trial or other further proceedings, the order is generally not appealable. An exception to this rule has been recognized, and the appeal allowed, when the district court was without jurisdiction to enter the order.

19 *Moore's Federal Practice* § 202.14[1][a], p. 202-73 (3rd ed. 2004). As discussed in Part II below, the district court clearly did have diversity jurisdiction, following removal, to rule on the motions presented to it. Therefore, the above-stated exception does not apply, and the Court's Order granting MTGLQ's Rule 60(b) motion is nonfinal,

and not appealable. *See, e.g., Jones & Guerrero Co. v. Sealift Pacific, Inc.*, 650 F.2d 1072, 1073 (9th Cir. 1981) (order vacating prior order of dismissal not appealable).

II. PETITIONER PRESENTS NO REASON TO GRANT CERTIORARI.

Even if the Petition were not fatally defective because this case is not "in" the court of appeals, Jenkins nonetheless presents no reason to grant the Petition.

Under Rule 10, certiorari is granted only to review a decision of a United States court of appeals. The only decision of the Tenth Circuit in this case is that Jenkins' appeal to it must be dismissed for lack of appellate jurisdiction. Since this ruling was clearly correct, the decision of the court of appeals presents no issue meriting the attention of this Court.

In his Petition Jenkins does not even address the correctness of the Tenth Circuit's dismissal for lack of jurisdiction. Instead, he challenges issues that have only been addressed by the district court: specifically, as stated in his Petition: "Whether the United States District Court has jurisdiction to void a state court's default judgment." Petition, p. i. (More accurately, MTGLQ believes that a proper statement of the issue would be: "Whether, following the entry of a state court default judgment and removal to the district court, the district court has authority to set aside the default judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure.")

As indicated, this issue was not considered by the Tenth Circuit. Therefore, applying the criteria in Rule 10, this Court should decline to address the issue. *See, e.g.,*

NCAA v. Smith, 526 U.S. 459 (1999) (declining to decide in first instance issues that were not decided by court of appeals).

Even assuming, however, that the issue raised in the Petition had been fully addressed by the court of appeals, this case still would not satisfy Rule 10's criteria for granting certiorari. In the Petition Jenkins questions both the jurisdiction of the district court, and its authority to vacate the default judgment pursuant to Rule 60(b). But in advancing these positions Jenkins fails to articulate any reason to grant certiorari.

To begin with, the Court clearly acquired jurisdiction of this Action upon timely removal to the district court. As set forth in the Notice of Removal (Appendix A hereto), the plaintiff and defendant have diverse citizenship, and the amount in controversy is in excess of $75,000, thus satisfying the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a).

After the Notice was filed, "the federal court [took] the case on removal exactly as the case stood in state court." 16 *Moore's Federal Practice*, § 107.31[3], p. 107-182.8 (3rd ed. 2004). Accordingly, the district court could properly entertain MTGLQ's motion to set aside the default judgment, pursuant to Rule 60(b):

> The general rule that a Rule 60(b) motion must be made in the court in which the judgment was rendered has no application to judgments rendered in state courts when the proceedings are subsequently removed to federal court. Once an action is removed to federal court, the district court to which the action is removed may consider a Rule 60(b) motion, even if it attacks a judgment initially rendered in state court.

12 *Moore's Federal Practice*, § 60.60[3][a], p. 60-191 (3rd ed. 2003).

The foregoing legal principles are well established. Jenkins has not directed the Court's attention to any conflict in the decisions of the lower federal courts, to any "important question of federal law" meriting this Court's attention, or to any "depart[ure] from the accepted and usual course of judicial proceedings," that could possibly merit granting Jenkins' Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 19th day of January, 2005.

Respectfully submitted,

GEORGE W. PRATT
Counsel of Record
JONES WALDO HOLBROOK
& MCDONOUGH PC
170 South Main Street,
Suite 1500
Salt Lake City, Utah 84101
(801) 521-3200

Attorneys for Respondent
MTGLQ Investors, L.P.

APPENDIX A

George W. Pratt (USB #2642)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for MTGLQ Investors, L.P.
170 South Main Street, Suite 1500
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Facsimile: (801) 328-0537

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LYNN ALLAN JENKINS I, Plaintiff, v. MTGLQ INVESTORS, L.P., and JOHN DOES 1 THROUGH 10, Defendants.	**NOTICE OF REMOVAL** **Judge Dale A. Kimball** **DECK TYPE: Civil** **DATE STAMP: 12/12/2003 @15:51:23** **CASE NUMBER: 1:03CV00148 DAK**

(Filed Dec. 12, 2003)

MTGLQ Investors, L.P. ("MTGLQ") hereby provides notice of the removal of this civil action, filed in the Second Judicial District Court of Davis County, State of Utah, to the United States District Court for the District of Utah. In connection with this removal, MTGLQ respectfully represents as follows:

1. On or about April 11, 2003 an action was commenced against MTGLQ by the filing of a Complaint in the

Second Judicial District Court of Davis County, State of Utah, styled *Lynn Allan Jenkins I v. MTGLQ Investors, L.P., et al.*, Civil No. 030700197 (the "Action"). A copy of the Complaint is attached hereto as Exhibit A.

2. The Complaint has never been served on MTGLQ, nor has MTGLQ ever been served with a Summons in connection with the Action.

3. Indeed, MTGLQ was completely unaware of the Action until November 24, 2003, when MTGLQ's legal counsel received a Foreclosure Report with respect to certain real property collateral held by MTGLQ located in Davis County. A true and correct copy of this Certified Foreclosure Report is attached hereto as Exhibit B.

4. As reflected in Schedule B to the Foreclosure Report, a Judgment, taken by default, was entered in the Action on September 4, 2003, in favor of plaintiff Lynn Allan Jenkins I. ("Jenkins"), against MTGLQ. A true and correct copy of this Judgment is attached hereto as Exhibit C.

5. This Action is a civil action of which the Court has original jurisdiction under 28 U.S.C. § 1332, which may be removed to this Court pursuant to 28 U.S.C. § 1441, in that:

a. Plaintiff Jenkins is a resident of Davis County, Utah, and a citizen of the State of Utah;

b. Defendant MTGLQ is a limited partnership organized under the laws of the State of Delaware, whose principal place of business is in New York, New York, and

c. The matter in controversy in this action exceeds the sum or value of $75,000, exclusive of interest and costs.

DATED this 12th day of December, 2003.

JONES, WALDO, HOLBROOK
& McDONOUGH

By /s/ George Pratt
George W. Pratt
Attorneys for MTGLQ
Investors, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2003, I caused a true and correct copy of the foregoing NOTICE OF REMOVAL to be served, by first class mail, postage prepaid, on the following:

Lynn A. Jenkins I
3 East 2750 South
Bountiful, UT 84010

/s/ George Pratt